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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITIZENS FOR A CONSTITUTIONAL CONVENTION, LET THE PEOPLE DECIDE, MARK. J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, and JERRY BECK, on behalf of themselves and others similarly situated,

Petitioners,

v.

DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, MAZIE K. HIRONO, Lieutenant Governor of Hawaii, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS, STATE OF HAWAII,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petitioners to this proceeding are five individuals and two associations. The individuals are Mark J. Bennett, Charles S. Frumin, Bobbie Carinio, Mark R. Spengler, and Jerry Beck. The associations are Let the People Decide and Citizens for a Constitutional Convention.[1]

The respondents are a Hawaii state agency--the Hawaii Office of Elections--and three Hawaii state officials named solely in their official capacity--Governor Benjamin J. Cayetano, Lieutenant Governor Mazie K. Hirono, and Chief Election Officer Dwayne D. Yoshina.

The Hawaii State AFL-CIO and a number of individuals were denied intervention in the courts below and are not parties to this proceeding.

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[1]This case was captioned *Bennett v. Yoshina* from its commencement through all the Ninth Circuit proceedings. In their petition for a writ of certiorari, petitioners spontaneously have rearranged the order in which they list themselves in the caption.

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CHRONOLOGY[2]

1996

November 5 General Election Day

November 5 Vote on constitutional convention question:
163,869 - yes
160,153 - no
45,245 - blank
90 - spoiled

November 19 Attorney General opinion--constitutional convention question approved

November 25 Complaint filed in *Yoshina* in Hawaii Supreme Court original proceeding

1997

January 24 Last day for bill introductions in 1997 Legislature

March 24 Hawaii Supreme Court decides *Yoshina*--constitutional convention question rejected

March 24 Office of Elections certifies constitutional convention question as rejected in compliance with Yoshina

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[2]This chronology largely reproduces the chronology appearing at Pet. App. 247a-248a and is based on the case record, except for the last three entries, which are matters of public record (and relied upon in petitioners' supplemental brief).

April 15	Bennett files complaint in federal district court, seeks alternative relief *either* of new election *or* of re-certification of constitutional convention as approved
May 1	Hawaii Legislature adjourns
July 11	Federal district court enters judgment for Bennett requiring special election; enjoins application of *Yoshina* to 1996 election
July 15	Yoshina appeals
August 11	Bennett cross appeals on theory that district court selected the wrong alternative relief requested
September 10	Ninth Circuit grants stay of special election and expedites appeals
October/ November	Appeal and cross-appeal briefed

1998

January 16	Ninth Circuit hears argument in San Francisco
January 21	Hawaii Legislature convenes for 1998 session.
January 28	H.B. 3130 introduced in House of Representatives
February 20	H.B. 3130 passes third House reading and transmitted to Senate
March 27	Ninth Circuit issues Opinion--Bennett loses; Yoshina awarded costs on appeal from Bennett

April 10	Bennett petitions Ninth Circuit for rehearing and rehearing en banc
April 14	H.B. 3130 passes third Senate reading as amended
April 29	House agrees to Senate amendments
May 1	H.B. 3130 transmitted to Governor
May 5	Bennett moves Ninth Circuit to stay consideration of rehearing because of H.B. 3130
May 22	Bennett supplements motion to stay with update on status of H.B. 3130
June 22	Governor approves H.B. 3130 (Act 131)
June 23	Ninth Circuit non-substantively amends Opinion and denies rehearing requests
July 1	Ninth Circuit enters mandate; $418.60 costs taxed against Bennett
July 7	Bennett files in Ninth Circuit "Suggestion of partial mootness and plaintiffs' motions (1) to transfer plaintiffs' claim for attorneys fees to the district court, or, in the alternative, for award of attorneys' fees on appeal; (2) to recall the mandate, and (3) to vacate the judgment and remand with instructions" (the fee request)
August 5	Yoshina opposes fee request in Ninth Circuit
October 21	Bennett files petition for a writ of certiorari
October 29	Ninth Circuit notified of filing of petition for a writ of certiorari

November 3 General election day

November 3 Vote on constitutional convention question:

244,753 - no
140,688 - blank
26,784 - yes
295 - spoiled

November 23 Time for election challenge expires; constitutional convention question certified as rejected.

STATEMENT

A. INTRODUCTION

In order of importance to *petitioners,* the issues presented by the petition are: (1) petitioners' quest for attorneys' fees for losing a case in the Ninth Circuit; and (2) the merits of the Ninth Circuit opinion.

In their lawsuit, petitioners asked for the alternative relief of an order *either* directing a re-vote of the 1996 constitutional convention question *or* directing the re-certification of the 1996 vote as having approved the constitutional convention question.

Petitioners obtained neither of the alternative forms of relief requested because the Ninth Circuit held that the challenged 1996 election did not violate the United States Constitution. *After* the Ninth Circuit ruled against petitioners, the State of Hawaii gratuitously enacted Act 131, placing the constitutional convention on the ballot in the November 1998 election. Petitioners then represented to the Ninth Circuit that the re-vote alternative was the principal relief sought. "[Act 131] grants Plaintiffs the principal relief sought in this litigation--a new election on the convention question." (Pet. App. 179a)

In November 1998, the constitutional convention question was *again* rejected.

Petitioners ask this court to grant a writ of certiorari on two grounds. They ask this Court to GVR this case--to *grant* certiorari, *vacate* the judgment of the Ninth Circuit and *remand* to the Ninth Circuit for consideration, in light of Act 131, of petitioners' claims for attorneys' fees premised on the theory that their lawsuit was the catalyst for Act 131. In fact, the Ninth

Circuit was fully apprised of the potential enactment of Act 131 throughout the pendency of petitioners' unsuccessful request for rehearing.

The petition in this Court is premature because petitioners' fee request is pending in the Ninth Circuit.

The equities, including petitioners' lobbying in support of Act 131, do not support vacating the judgment.

The catalyst claim is insubstantial both chronologically and on the merits. The Ninth Circuit rejected petitioners' constitutional claims *in toto* three months *before* Act 131 was enacted. And, no court has awarded attorneys' fees on a catalyst theory for a total, across-the-board litigation defeat.

There is no basis in the procedural facts of this case for issuance of a GVR order, and there is particularly no basis for issuance of a GVR order when, as here, the decision below does not merit review.

In order to eliminate their loss in the Ninth Circuit to pursue their claim for attorneys fees, petitioners ask this Court, if the GVR request is rejected, to grant plenary review of the merits of the Ninth Circuit decision to afford petitioners the "alternative" relief of an order re-certifying as approved the 1996 election result now certified as rejected.

The Ninth Circuit's decision that there was no constitutional violation is correct and accords with the law of all other circuits on the narrow circumstances in which federal courts may take the drastic step, fraught with implications for federalism and state sovereignty, of intervening in state elections. The law lies evenly over the land. The application of the law to vastly differing fact situations of course results in differing outcomes from case to case--sometimes plaintiffs prevail, sometimes defendants--but the law is constant.

Moreover, the "alternative" relief of re-certification of the 1996 election results is not available to petitioners, because, under their own theory of having obtained the principal relief sought of a new election, re-certification relief would be cumulative and duplicative rather than alternative. In addition, the retrospective undoing by a federal court of a certified state election would violate the Eleventh Amendment and would require, completely contrary to the decision in *Yoshina* of the Hawaii Supreme Court as the final arbiter of the Hawaii Constitution, that blank ballots *not* be counted as ballots cast upon the question.

B. FACTS

1. The 1996 General Election

Article XVII, Section 2 of the Hawaii Constitution provides two different methods for submitting to the electorate the question whether to convene a constitutional convention. Under the first, the Hawaii Legislature may submit the question as often as it pleases at any general or special election. Under the second, the constitutional convention question must be automatically submitted to the electorate no less frequently than every ten years at a general election.

The constitutional convention question was included in the November 5, 1996 general election as an automatic ten-year submission. Of the total 369,357 ballots:

163,869	were marked yes,
160,153	were marked no,
45,245	were left blank, and
90	were marked both yes and no (overvotes)

The Hawaii Constitution provides that a proposed constitutional convention is approved if "a majority of the ballots cast upon such a question" are in the affirmative. (Haw. Const. art. XVII, § 2).

In the thirty-seven years of Hawaii statehood preceding the 1996 election, no Hawaii court had ever interpreted or been asked to interpret this language. There had been no need to interpret it because the blank ballots were irrelevant to the outcome of the three prior votes (all of the automatic ten-year variety) in 1966, 1976, and 1986 on convening a constitutional convention.

The 1996 vote was sufficiently close that the outcome turned on whether the constitutionally-required calculation of "a majority of the ballots cast upon such a question" was based on only the yes or no ballots or whether the calculation included the blank ballots as well.

The Chief Election Officer requested the opinion of the Hawaii Attorney General on how to calculate a majority under Article XVII, Section 2. The Attorney General's response, not formed in an adversarial context, was that the blank ballots were not ballots cast upon the question and that the constitutional convention question had been approved.

2. Hawaii Supreme Court

The Hawaii State AFL-CIO and others filed a timely original adversarial election contest against respondents in the Hawaii Supreme Court, requesting judgment that the constitutional convention question had been rejected. The Hawaii Supreme Court is "the ultimate judicial tribunal in the state" and has "final unreviewable authority to interpret and enforce the Hawaii Constitution." *State v. Fields*, 686 P.2d 1379, 1390 (Haw. 1984) (citation omitted).

The Hawaii Supreme Court held that the convention question had been rejected because a majority of ballots cast on the question--including the blank ballots--were not affirmative votes. *Hawaii AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997) *(Yoshina)*. Its opinion was based on: (1) the singular language of Article XVII, Section 2; (2) the intent of the framers of the Hawaii Constitution, based on the court's diligent review of the proceedings of the 1950 constitutional convention; and (3) the purposeful distinction in Article XVII, Section 2 between the "majority of the *ballots cast* upon such a question" required for convening a convention and the "majority of all the *votes tallied* upon the question" required for approving convention-proposed amendments (emphases added). *Yoshina*, 935 P.2d at 91-98.

The final sentence of *Yoshina* directed the Chief Election Officer to certify that the question had been rejected, and he immediately did so.

3. United States District Court

Petitioners filed their federal complaint three weeks after the Hawaii Supreme Court decided *Yoshina*. The primary theory of the complaint was that *Yoshina* was unforeseeable and rendered the election on the constitutional convention question fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners requested from the court the *alternative* relief of *either*: (1) ordering respondents to certify, precisely contrary to the holding in *Yoshina*, that the voters had approved the constitutional convention question at the 1996 general election; *or* (2) ordering respondents to hold a special election to re-vote the precise question that the Hawaii Supreme Court held in *Yoshina* was rejected.

Respondents defended on the grounds that *Yoshina* was neither unforeseeable nor unfair. The Hawaii Supreme Court ruled on a question of first impression and interpreted constitutional language that has no counterpart in Hawaii or elsewhere. Second, the past practice in Hawaii was to include blank ballots in the vote count. They were counted *as cast* as blank ballots, along with the other categories of yes, no, and spoiled.

There was no past practice concerning whether in calculating a "majority of the ballots case upon such a question," the blank ballots should be assigned along with the separate no ballots to the denominator of ballots cast, as *Yoshina* held, or should just be disregarded as though they had never been cast, as petitioners contended.

The sum total of "past practice" evidence preceding the 1996 general election on the issue comprised the conflicting facts that: (1) in *1966*, voters were forewarned that blank ballots would be counted as ballots cast in the denominator of the calculation in the same manner as would the no votes (CR 22 S.J. Opp'n Ex. B); and (2) in *1996*, two business days before the election, the Office of Elections printed up but did not distribute its fact sheet stating that blank ballots would not be included in the calculation of a majority on the constitutional convention question (CR/ER 8 Ex. 6).

There is no evidence during the thirty years between 1966 and 1996 of any fact sheet or similar pronouncement by any state election official concerning the treatment of blank ballots in calculating the constitutionally-required majority for convening a constitutional convention.

The district court decided the case on cross motions for summary judgment. The court: (1) granted petitioners' motion, (2) denied respondents' motion, (3) enjoined the application of

Yoshina to the 1996 election, thereby nullifying the judgment of the Hawaii Supreme Court on the very issue presented to it, and (4) ordered respondents to hold a special election to re-vote the constitutional convention question.

4. Ninth Circuit Opinion

Respondents appealed the judgment entered against them, and petitioners cross-appealed as to the relief granted. The Ninth Circuit stayed the special election ordered by the district court. On the merits, the Ninth Circuit found that the Hawaii Supreme Court's decision in *Yoshina*, applying its "blank votes count as ballots cast" rule to the 1996 vote, did not violate petitioners' substantive due process rights. The Ninth Circuit reversed the judgment in favor of petitioners, remanded with instructions to enter judgment in favor of respondents, and dismissed petitioners' cross appeal seeking an order certifying as approved the rejected 1996 constitutional convention question.

The Ninth Circuit opinion reflects a straightforward application of the law, *uniform from circuit to circuit*, that federal courts will not intervene in state elections in the absence of egregious wrongdoing.

5. Petition for Rehearing

Petitioners filed for rehearing and suggested the appropriateness of rehearing en banc. The petition was filed April 10 and denied June 23, 1998. The mandate issued July 1, 1998 and included the taxation of $418.60 costs against petitioners.

6. 1998 Legislative Proceedings

The Hawaii Legislature convened January 21, 1998--five days after the oral argument in the Ninth Circuit in this case.

The legislature entertained a bill (H.B. 3130) to submit the constitutional convention question to the voters at the November 1998 general election. The Ninth Circuit issued its opinion, rejecting petitioners' claims in their entirety, on March 27, 1998. A full month after that date, the bill was passed by the legislature and transmitted to the governor, who signed it into law (Act 131) June 22, 1998, three months after the Ninth Circuit's decision.

On June 23, 1998, the day after the governor signed H.B. 3130 into law, the Ninth Circuit non-substantively amended its March 1998 opinion and denied the petition for rehearing and rejected the suggestion of rehearing en banc.

During the time that the petition for rehearing was pending, petitioners twice notified the Ninth Circuit of the existence and status of the bill in the Hawaii Legislature to submit the constitutional convention question to the voters in November 1998. Specifically, petitioners filed pleadings on May 5 and May 22, 1998 to stay consideration of their rehearing requests because of the potential enactment of Act 131. Page 3 of the May 5 motion advised the court of petitioners' theory that Act 131 "may result in mooting some or all of the issues currently involved in this case."

As a result of Act 131, the constitutional convention question was submitted to the electorate by legislative option at the November 3, 1998 general election. The question was again rejected. The vote was:

140,688 - yes
244,753 - no
26,784 - blank
295 - spoiled

The election was not challenged, the time for so doing expired November 23, 1998, and the Office of Elections has certified the 1998 constitutional convention question as rejected.

7. Post-Mandate Legal Proceedings

After the Ninth Circuit issued its mandate, petitioners filed their cumbersomely-titled, convoluted, and voluminous "suggestion of partial mootness and plaintiffs' motions (1) to transfer plaintiffs' claim for attorneys' fees to the district court, or, in the alternative, for award of attorneys' fees on appeal, (2) to recall the mandate, and (3) to vacate the judgment and remand with instructions" (the fee petition). The theory of the fee petition was that petitioners' unsuccessful lawsuit was the catalyst for Act 131 and that petitioners were therefore transformed into the prevailing party and entitled to attorneys fees.[1]

Respondents' opposition to the fee petition, filed August 6, 1998, argued that petitioners' lawsuit could not qualify as the catalyst for Act 131, even in the circuits that recognize the catalyst theory of fee recovery, that respondents' appeal was not moot, and that there was no basis for vacating the judgment. (Pet. App. Q).

The Ninth Circuit did not act on the fee petition before petitioners filed their petition in this Court for a writ of certiorari.

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[1]Petitioners contemporaneously filed in the district court a document entitled "Plaintiffs' motions for attorneys fees, to vacate taxation of costs against plaintiffs, and to vacate judgment in part and to dismiss in part as moot." The motion included as an exhibit petitioners' fee petition in the Ninth Circuit. The district court, faced with a motion to tamper with the Ninth Circuit judgment, sua sponte dismissed the motion without prejudice as premature.

ARGUMENT

A. THERE IS NO BASIS FOR ISSUANCE OF A GVR ORDER

1. The GVR Request is Premature

Petitioners have moved the Ninth Circuit to determine that Act 131 has mooted respondents' appeal (but not petitioners' cross-appeal), to recall the mandate and vacate the panel decision, and to remand to the district court for an attorneys' fee determination (Pet. App. 178a-241a). The Ninth Circuit did not rule on petitioners' motion before the petition for a writ of certiorari was filed in this Court.

There is no reason for this Court to consider these matters before the Ninth Circuit completes its consideration, and there is no reason for this Court to consider the fee petition in the first instance.[2] The "limbo" of which petitioners complain (Pet. 24) results from their own voluntary action in pursuing their fee petition on three separate fronts in the district court, the Ninth Circuit, and this Court. The Ninth Circuit should be afforded the opportunity to decide the fee issue first. This would give the Court the benefit of a ruling to review and may well obviate any need for review by this Court.

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[2]If the Ninth Circuit granted petitioners the complete relief they requested, petitioners would likely not be seeking certiorari.

The only technical difference is that if this Court grants the GVR request, it would be *vacating the Ninth Circuit's judgment* (with the Ninth Circuit then reconsidering what to do in light of Act 131). But petitioners' pending motion before the Ninth Circuit also asks the Ninth Circuit to vacate its judgment.

2. GVR Could Not Reasonably Result In A Redetermination

GVR is not appropriate because the Ninth Circuit had full opportunity to consider petitioners' claim of mootness based on Act 131. As petitioners themselves acknowledge, the Ninth Circuit panel "was told of the potential enactment of Act 131 on May 5, 1998 (Pet. at 7)" and was specifically advised of petitioners' theory of mootness. Thus, the Ninth Circuit had fully seven weeks to consider the impact, if any, of enactment of Act 131 on their opinion.

While the facts that the Ninth Circuit was fully apprised of and had ample time to consider the impact of Act 131 do not absolutely prohibit GVR, *see Lawrence v. Chater,* 516 U.S. at 169-70, they strongly counsel against it. This Court's "GVR power should be exercised sparingly." *Lawrence v. Chater,* 516 U.S. at 173. There is no compelling reason to return this case to the Ninth Circuit for consideration of Act 131 when the Ninth Circuit was fully apprised of, and presumably considered, the potential enactment of Act 131 long before it denied rehearing.[3]

3. Petitioners' Lawsuit Was Not the Catalyst for Act 131

The driving force behind the petition for a writ of certiorari is the claim that petitioners' lawsuit was the catalyst for enactment of Act 131, thereby transforming petitioners to prevailing parties and entitling them to attorneys' fees and costs.

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[3]Furthermore, Act 131 was enacted into law on June 22, 1998, one day before the Ninth Circuit issued its denial of the petition for rehearing. Thus, not only did the Ninth Circuit have seven weeks to consider the impact of the *potential* enactment of Act 131, the Ninth Circuit denied the petition for rehearing *after* Act 131 was in fact enacted.

The catalyst claim does not justify granting the writ. First, petitioners did not obtain any injunctive relief or settlement or consent judgment or comparable relief in their lawsuit. Exactly the opposite is true; petitioners lost across the board in the Ninth Circuit. They obtained *nothing* in their lawsuit. They owe costs.

If anything, it was the *complete failure* of petitioners' lawsuit that served as the catalyst for Act 131. To those Hawaii citizens in favor of convening a constitutional convention, Act 131 would have been *unnecessary* if petitioners had succeeded in their federal lawsuit. Act 131 was "necessary" only because of petitioners' complete litigation *failure*. Petitioners are illogically saying that they are entitled to attorneys fees because of the total failure of their lawsuit.

Second, petitioners' catalyst claim is chronologically unsustainable because Act 131 was enacted three months *after* the Ninth Circuit ruled *against* petitioners.

Third, petitioners assume that the catalyst theory of fee recovery is still viable after *Farrar v. Hobby*, 506 U.S. 103 (1992).[4] Even if true, that assumption does not detract from the fact that no circuit, including catalyst circuits, recognizes a totally adverse litigation outcome as a fee catalyst.

4. Vacatur Is Unwarranted

The vacatur doctrine of *United States v. Munsingwear*, 340 U.S. 36 (1950), and *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), addressing mooting events that occur prior to review/decision on appeal, does not

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[4]As reported in *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995), the Fourth Circuit has held that *Farrar* precludes a catalyst theory of fee recovery.

help petitioners. Those cases hold that where review is prevented through happenstance--that is, where mootness is due to circumstances unattributable to any of the parties--or where mootness results from unilateral action of the party (here, respondents) who prevailed in the court from which review is sought, the decision of that court may be vacated. The doctrine is rooted in the equitable notion that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp,* 513 U.S. at 25. And the same holds true "when mootness results from unilateral action of the party who prevailed below."[5] *Id. Bancorp* explicitly rejected vacatur where the mootness resulted from settlement, noting that the "principal condition to which we have looked [in rejecting vacatur] is whether the party seeking relief from the judgment below caused the mootness by voluntary action." 513 U.S. at 24.

Thus, even if this case were moot,[6] this Court should nonetheless *not* vacate the Ninth Circuit merits decision because

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[5]It is clear that enactment of Act 131 was *not* the result of unilateral action of respondents Yoshina, Hirono, Cayetano, or the Office of Elections, the parties who prevailed in the Ninth Circuit.

[6]The certification of the 1996 election as rejected remains on the books. The election does not bear the stigmatic result of "result undetermined until, by federal court order, a new, fair election is held."

Petitioners' claim of mootness is based on the theory that the 1998 legislative-option election on the constitutional convention question is an *equal substitute* for the 1996 constitutionally-mandated election. "Petitioners asked for one new vote. They got one." (Pet. at 23). In light of this representation and in light of petitioners' representation that they have already obtained the "principal relief sought" (Pet. 179a), this Court need not reach the issue whether the request for re-certification relief is moot or not. That request has either been abandoned or would result in duplicative relief.

petitioners themselves acquiesced in the alleged mooting action, i.e., the enactment of Act 131. Indeed, petitioners lobbied for passage of Act 131. Whether or not petitioners can be said to have directly "caused the mootness by voluntary action"--i.e., whether or not their lobbying in favor of Act 131 directly caused the bill to pass--they actively supported passage of Act 131. (Pet. App. 219a-221a; 225a-231a). Because petitioners lobbied for, and for whatever reason received, precisely what they wanted (namely, enactment of Act 131), knowing full well that they would then claim that Act 131 mooted the Ninth Circuit ruling adverse to them, it is not unfair that they cannot have the adverse ruling vacated. Petitioners' desire to obtain review of the adverse Ninth Circuit ruling was frustrated not by "the *vagaries of circumstance*," but by circumstances *they actively courted*. The equitable considerations that underlie the vacatur doctrine are plainly inapplicable to petitioners. Their actions lie at the voluntary end of the equitable spectrum and are far removed from the happenstance end.

B. THERE IS NO BASIS FOR REVIEW OF THE NINTH CIRCUIT DECISION

1. The Ninth Circuit Decision Is Correct On The Merits

The request for a GVR order, standing alone, should be denied and additionally should be denied because the case does not merit review in any event.

The Ninth Circuit correctly rejected petitioners' constitutional challenge to the 1996 election even under the assumption--erroneous, we submit--that the inclusion of blank ballots in the denominator of "ballots cast upon the question" diverged from past practice. Because the record fails to support that assumption, petitioners' constitutional claims are particularly insubstantial.

The role of the federal courts in state elections is exceedingly narrow. First, the correctness of the Hawaii Supreme Court in *Yoshina* is beyond the purview of this or any federal court. "Neither [the United States Supreme Court] nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, ___,117 *S.Ct. 1800, 1804 (1997).*

Second, extreme caution is required when state election results are challenged. The federal appellate courts uniformly recognize that federal intervention in state elections "necessarily implicates important concerns of federalism and state sovereignty . . . . Indeed, the voiding of a state election is a "drastic if not staggering" remedy." *Soules v. Kauaians For Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (citations omitted). Invalidation is "reserved for instances of willful or severe violations of established constitutional norms." *McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy J., concurring) (citing *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978)).

Third, the Ninth Circuit in this case recognized and applied the distinction between "fundamental unfairness" and "garden variety election irregularities" (Pet. App. 16a-17a) that is uniformly recognized and applied by the circuit courts of appeals.[7]

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[7]The Ninth Circuit cited *Soules*, 849 F.2d at 1183-84 for this proposition. *Soules* in turn cites cases from the First, Fourth, Fifth, Seventh, Eight, and Eleventh circuits for the "hornbook law" that section 1983 does not provide a right of action for garden variety election regularities and that only a pervasive error which undermines the organic processes of the ballot is sufficient to trigger constitutional scrutiny. *Id. See also Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995), cert. denied sub nom. *Davis v. Alabama*, 516 U.S. 908 (1995).

The Ninth Circuit brought common sense to bear on petitioners' theory that the persons casting *blank* ballots on a "yes" or "no" question secretly favored the "yes" position:

> Citizens who wished to vote "yes" or "no" were presented with a clear way to do so. Voters who didn't care simply left the question blank. It is beyond belief to suggest that thousands of voters who left the convention question blank were secretly relying on the hope that their votes would not be counted, and that they would have voted "yes" had they foreseen the decision in *Yoshina* I. They did not vote because they did not care or did not care enough to do so.

(Pet. App. 19a-202).

The few cases in which federal courts have found fundamental unfairness justifying intervention in state elections largely involve legerdemain or outright fraud or racial discrimination (or a combination) in absentee ballots. E.g. *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995) (inclusion of improper absentee ballots diluted proper absentee and in person ballots); *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) (massive absentee ballot fraud); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (exclusion (with racial overtones) of proper absentee and shut-in ballots disenfranchised almost ten percent of the voters).

All Hawaii voters in the 1996 general election received the ballot on the constitutional convention question. No Hawaii voter was disfranchised. All ballots were counted as cast--the yes ballots as yes, the no ballots as no, and the blank ballots as blank, all just as they always have been counted and just as they were subsequently counted in 1998. No Hawaii voter suffered a dilution of his or her vote because of the inclusion of illegal or invalid ballots. All that happened was that the blank ballots cast

were included in the denominator of ballots cast upon the question in calculating whether the numerator yes votes were a majority of votes on the constitutional convention question.

2. The Relief of Re-Certification Is Unattainable

Not only is there no reason in the law for this Court to grant plenary review of the merits of the Ninth Circuit decision, but the purpose for which petitioners seek such review is unattainable and frivolous.

Specifically, petitioners, who claim to have previously obtained the principal relief sought, now seek review of the merits for the purpose of obtaining the "alternate" relief sought of a federal court order re-certifying as approved the 1996 constitutional convention question that stands certified as rejected. This retrospective re-certification is unavailable. First, the "alternate" relief is cumulative and duplicative to the "principal relief" that petitioners claim to have obtained from Act 131. Second, a re-certification order could only be based upon not counting the blank ballots as ballots cast upon the question, in direct violation of the decision of the Hawaii Supreme Court, the final arbiter of the Hawaii Constitution, that the blank ballots are counted as ballots cast upon the question.[8]

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[8]In contrast, if a federal court decided that the 1996 election on the constitutional convention question was fundamentally unfair and ordered a *re-vote*, the re-vote order would not violate *Yoshina* by consigning the 1996 blank ballots to the "do not count" category.

In *Roe*, the Eleventh Circuit made the unremarkable observation that the decision of the Alabama Supreme Court construing an Alabama statute did not address the issue whether constitutional rights had been infringed. 68 F.3d at 409. The *Roe* court did not address the question of the propriety of a *remedy* in contravention of the construction of the state supreme court.

Furthermore, granting petitioners' request for re-certification of the 1996 election results would require retroactively undoing the existing certification that the 1996 constitutional convention question was rejected. This would violate the Eleventh Amendment. *Cf. Papasan v. Allain*, 478 U.S. 265, 279-81 (1986) (*retrospective* injunctive relief does *not* fall within *Ex parte Young* exception to Eleventh Amendment bar).

3. Petitioners' Supplemental Brief Is Nonsensical

Petitioners' supplemental brief makes three arguments that are wholly without merit. First, petitioners claim that the fact that the 1998 blank vote percentage was lower than the 1996 blank vote percentage proves that voters were misled in the 1996 election about the meaning of blank votes. This is baseless speculation. There could be any number of *other* reasons--including the electorate being better informed the second time around about the pros and cons of holding a constitutional convention--to explain why the blank vote percentage decreased. Petitioners provide this Court with no evidence to support their speculative theory over any other explanation.[9]

Second, petitioners argue that the mere fact that the 1998 vote *occurred* furthers their "prevailing party" theory. But the fact of the 1998 election is hardly a revelation, because the enactment of Act 131 in June 1998 made it a foregone conclusion that a vote would occur in November 1998. Time

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[9] If anything, the 1998 election results debunk the entire theory of petitioners' case that persons casting blank ballots in 1996 on a yes or no question secretly favored the yes position. From 1996 to 1998, the yes vote *decreased* by some 23,000 votes. That is, the blank ballots went to no rather than to yes.

passed; the election happened. More importantly, the fact that the 1998 vote occurred does nothing to overcome the fatal defects in petitioners' attorneys fee claim: 1) the fact of the complete failure on the merits of their lawsuit and 2) the fact that Act 131, which produced the 1998 vote, was enacted *after* their lawsuit had been flatly rejected.

Third, the mere fact that the Ninth Circuit has not, to this date, acted upon petitioners' fee motion does not in any way suggest that this court should GVR this case[10]. The Ninth Circuit could act at any time, and petitioners do not suggest any reason not to wait. Petitioners do not even suggest that the "delay" is causing them any harm, much less irreparable harm. And, if it were, their remedy would be mandamus rather than certiorari.

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[10] It may be that, at this juncture, the Ninth Circuit is waiting for this Court to act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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